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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS AMERICAN INVESTORS FUND, INC. AND CHESTNUTT CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents American Investors Fund, Inc. and Chestnutt Corporation submit this brief in opposition to the petition of General Time Corporation for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered November 19, 1968 which affirmed the final judgment of the District Court entered October 4, 1968.

Reasons for Denying the Writ

1. *The petition is sham and seeks to mislead the Court.*

The underlying assumptions of the petition are that a wrong has been committed; that the wrong has been pleaded; and that for reasons of both law and justice, petitioner is entitled to redress.

None of these assumptions is true. Each is demonstrably false.

There is no allegation of actual or potential injury to any person or party. The SEC and the courts below have found that there could be no injury to anyone.

Petitioner seeks to conceal the falsity of these assumptions by a calculated omission of the important and controlling words of the statute when introducing its "Questions Presented" (Pet., p. 2) and by failing to make any reference in the body of its petition (save in a single footnote on page 6), or in any appendix, to the SEC's complaint, or anywhere at all to petitioner's single paragraph answer which merely admits the seventeen allegations of the complaint.

That truncated excerpt from the statute omits the only important words, employing punctuation also calculated to mislead. The omitted words show that the grant to the Commission of rule making power was solely:

> "* * * for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant." Investment Company Act of 1940 §17(d), 15 U.S.C. §80a—17(d).

Mere reference to these words demonstrates that under these words in the statute and in the circumstances of this case the complaint and petitioner's answer did not, nor could they truthfully, put any matter of fact or law in issue.

Consequently, petitioner simply ignores all pleadings in the hope that this Court will be beguiled not to advert to the pleadings and the words of the statute. The complaint and petitioner's single paragraph answer admitting the seventeen allegations of the complaint are set forth as "Appendix A" and "Appendix B" to our brief in opposition to the petition in Docket No. 512.

We will not burden the Court by repeating the arguments contained in our brief in opposition in Docket No. 512, especially at pp. 9-12. We believe it is demonstrated that no case or controversy exists in the constitutional sense.

2. *No party in interest appealed or seeks review.*

The brief of the SEC submitted as *amicus curiae* at the request of the Court below stated with respect to the provisions of the final judgment of October 4, 1968 entered by the District Court (pp. 13-14):

> "* * * indeed as a substantive matter, we take no particular exception to them, and this is one reason why the Commission did not itself determine to appeal in this case".

The Court below said that the provisions of the judgment "appear admirably designed to achieve the statutory objective". (Pet., App. A., p. 10a) The Court of Appeals thereby approved the Chancellor's independent exercise of discretion.

All the real parties in interest were thus satisfied with the result of the final judgment, although these respondents adhere to our view that the initial dismissal of the complaint by Judge Wyatt was completely correct. (Now reported at 286 F. Supp. 50 and printed as Appendix B to the petition in Docket No. 512).

3. *No question of administrative law is involved.*

As pointed out at pp. 8 and 19 of our brief in opposition to petition in Docket No. 512, and as repeatedly emphasized in Judge Friendly's three opinions, the Commission never purported to order anything against any of the respondents. The Commission in a final footnote simply asserted continuing jurisdiction under Section 17(d) of the Act over any future transfer by Talley Industries, Inc. Since this case was an independent suit in equity, and not a suit to enforce any order of the Commission (there being none), the staff of the Commission eventually and properly abandoned any attempt to assert that the mere filing of a complaint created bootstraps whereby the staff of the SEC could lift themselves to an automatic judgment. Nevertheless, petitioner, as a nominal party, now urges that it may vicariously lift itself by the SEC staff's discarded bootstraps.

4. *Petitioner has no standing.*

As recently as *Flast* v. *Cohen,* 392 U.S. 83, this Court has reviewed the question of standing. The opinion cited *Heald* v. *District of Columbia,* 259 U.S. 114, 123, in footnote 20 (392 U.S. at p. 99) emphasizing that there must be a claim of injury by a party. One may not assert the rights of absent third parties. There was no possibility of injury to petitioner in *Heald,* just as there is no possibility of injury to petitioner in this case.

Thus, while independent focusing on "standing" may be logically prior, or prior in time, to focusing on other aspects of "justiciability", it is clear that petitioner has no "personal stake" in the outcome which could impart "the necessary concrete adverseness". *Flast* v. *Cohen, supra; Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227; *Baker* v. *Carr,* 369 U.S. 186, 204. The petition here is of "a hypothetical or abstract character". *Aetna Life Ins. Co.* v. *Haworth, supra,* 300 U.S. at 240-241.

In short, the petition seeks an advisory opinion on a hypothetical and abstract question where there is no possibility of injury to any person or party. Petitioner has no interest whatever. The public interest has been protected by provisions "admirably designed to achieve the statutory objective".

We submit that reference to the pleadings and the opinion below show no possibility that petitioner has standing or that any case or controversy exists over which this Court has jurisdiction.

CONCLUSION

For the foregoing reasons and for the reasons stated in our brief in opposition to the petition in Docket No. 512 the petition should be denied.

December, 1968

Respectfully submitted,

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